

August 31, 2021

SEC Investor Advisory Committee Recommendation Regarding Rule 10b5-1 Trading Plans

Subcommittee of Investor Advisory Committee Likely to Recommend Changes to the Affirmative Defense and Disclosure Requirements for Rule 10b5-1 Trading Plans

SUMMARY

On August 26, 2021, the Investor as Owner Subcommittee of the Securities and Exchange Commission's Investor Advisory Committee issued its [draft recommendation](#) on proposed changes to the "affirmative defense" and disclosure and reporting requirements for Rule 10b5-1 trading plans. The Investor Advisory Committee is widely expected to approve recommendations based on this draft at its meeting on September 9, 2021, after which we expect that the SEC will propose rules in this area. The key proposals in the draft recommendation are (1) the implementation of a four-month cooling-off period before trades may occur under a newly adopted or modified plan, (2) prohibitions on overlapping plans, (3) required disclosures in Current Reports on Form 8-K, Forms 4 and proxy statements, (4) the application of Form 4 requirements to foreign private issuers and (5) the electronic filing of Form 144. Notably, many of these changes, including the four-month cooling-off period, would apply to individual and corporate trading plans, even though much of the scrutiny around trading plans has related to individual plans. Many of the proposed changes in the draft recommendation align with SEC Chair Gary Gensler's June 2021 [remarks](#) (discussed [here](#)), although the draft recommendation is silent on terminations of trading plans while in possession of material nonpublic information, as well as the intersection of trading plans with corporate share buyback programs, both of which were addressed in Chair Gensler's prior remarks.

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PROPOSED AMENDMENTS

The Subcommittee's proposals set forth in the draft recommendation include:

- *Cooling-Off Period.* The draft recommends requiring a four-month cooling-off period between adoption or modification of a Rule 10b5-1 trading plan and the first trade under the newly adopted or modified plan. In reaching this recommendation, the Subcommittee cites several academic studies and notes that “a cooling-off period of at least four months would ensure that insiders could not adopt a plan that executes a trade in the same quarter—the trade would necessarily be in the following quarter” after adoption of the plan. A four-month cooling-off period would be longer than periods generally recommended by practitioners, which typically are in the range of one to three months. This proposal does not distinguish between individual and corporate trading plans, even though the support for the proposal focuses on research relating to individual trading plans.
- *Limitations on the Number of Plans That May Be Adopted.* Chair Gensler's remarks in June 2021 noted that there currently are no limits on the number of plans that insiders may adopt, and that with the ability to enter into multiple trading plans and to cancel such plans at any time, “insiders might mistakenly think they have a ‘free option’ to pick amongst favorable plans as they please.” The Subcommittee's draft recommendation includes a prohibition on overlapping plans, so that an individual or issuer may not have more than one active Rule 10b5-1 trading plan at a time.
- *Public Disclosure of Trading Plans.* In the draft recommendation, the Subcommittee also suggests that the SEC adopt the following enhanced public reporting and disclosure requirements in connection with Rule 10b5-1 trading plans:
 - *Proxy Statements.* Requiring that proxy statements disclose the number of shares covered under corporate trading plans and trading plans for each of the company's “Named Executive Officers.”
 - *Current Reports on Form 8-K.* Modifying Form 8-K to require disclosure regarding the adoption, modification and termination of Rule 10b5-1 trading plans by the issuer or its affiliates, including the number of shares covered by such plans. The disclosure requirements would apply to corporate and many individual trading plans.
 - *Form 4.* Modifying Form 4 to include (1) a new checkbox to indicate whether a trade was made pursuant to a Rule 10b5-1 trading plan and (2) a new field to indicate the date of the relevant Rule 10b5-1 plan's adoption or modification. In addition, in a change that extends much more broadly than Rule 10b5-1 trading plans, the Subcommittee proposes that Form 4 disclosure requirements apply to all U.S.-listed securities, including those of foreign private issuers, which currently fall outside of Section 16.
 - *Form 144.* Requiring Form 144, which is required for affiliates trading at least \$50,000 in securities, to be filed electronically. The Subcommittee notes that “[t]he most comprehensive source of information currently available about Rule 10b5-1 is Form 144,” which currently may be submitted in paper or electronic form. The draft recommendation notes that the vast majority of Form 144s—over 99% in 2019—are filed on paper and are not digitized or retained in the SEC's Public Reading Room in Washington, D.C. for more than 90 days prior to being discarded. This results in what the Subcommittee calls a “two-tiered system where deeper-pocketed investors have access to potentially critical market data and investors of more modest means do not,” which the Subcommittee believes could be improved by requiring that all Form 144s be filed electronically.

Notably, the Subcommittee's draft recommendation does not address certain areas of potential reform that Chair Gensler had previously highlighted, such as potential limitations on how and when trading plans may be terminated while an insider is in possession of material nonpublic information or the intersection of

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insider trading plans with public company share buyback programs. It remains to be seen whether any recommendations for proposed rule changes will be made in those or other areas.

NEXT STEPS

The Subcommittee's draft recommendation will be discussed at the Investor Advisory Committee's September 9, 2021 meeting. The Subcommittee "recommends that the [SEC] move quickly to close identified gaps in the current rule," and the expectation is that the Investor Advisory Committee will adopt proposals based on this draft at the September 9, 2021 meeting. Given Chair Gensler's stated focus on this area, we expect that the SEC Staff will prioritize rulemaking in this area, incorporating most, if not all, of the Subcommittee's proposals, potentially with proposed rules as early as this fall.

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